



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Criminal Appeal 636 & 656 of 2010

DAVID MWANIKI NYAGA.....APPELLANTS
SAMUEL NJOROGE KARIUKI

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

These appeals are consolidated. The two appellants were charged in the first count with the offence of making a document without authority contrary to section 357 (a) of the Penal Code. It was alleged in the particulars of the offence that on or about the 11th day of September, 2008 at an unknown place within the Republic of Kenya with intent to defraud and without lawful authority or excuse jointly with others not before the court made a certain false document namely a co-operative bank of Kenya cheque No. 000401 for Kshs. 11,968,824/= payable to Meru South County Council purporting it to a genuine and valid cheque issued by Kenya Roads Board.

In count 2 the appellant Kennedy David Mwaniki Nyaga was charged with uttering a false document contrary to section 353 of the Penal Code. It was alleged in the particulars of the offence that on 16th September, 2008 at Equity Bank, Chuka Branch in Meru South district, he knowingly and fraudulently uttered the cheque in count 1 to Tabitha Wanjiru Thuo a cashier in the same bank. In count 3 both appellants were charged with the offence of attempted stealing contrary to Section 275 as read with Section 389 of the same Act. It was alleged in the particulars of the offence that on the 16th day of September, 2008 at Equity Bank Chuka Branch aforesaid, jointly with others not before the court they attempted to steal Kshs. 11,968,824/= the property of Equity Bank Kenya Limited.

The two appellants denied the offences but after a full trial they were convicted as charged in count 1 and 3 and the appellant David Mwaniki Nyaga was convicted as charged in count 2. Following the said conviction in count 1 and 3 each of the two appellants were sentenced to pay a fine of Kshs. 50,000/= in default to serve 12 months imprisonment in respect of each count. With respect to count 2 the appellant David Mwaniki Nyaga was sentenced to pay a fine of Kshs. 50,000/= in default to serve 12 months imprisonment.

These appeals arise from the said convictions and sentences. As the first appellate court it is my duty to go through the entire evidence adduced before the trial court, evaluate the same and come to independent conclusions. This I have done. Both appellants worked for Meru South County Council. The appellant Kennedy David Mwaniki Nyaga worked under Samuel Kariuki Njoroge who was the treasurer. From the evidence adduced there was an account that belonged to Meru South County Council but which was

dormant. A cheque was deposited into this account and since it raised some suspicion investigations led to the arrest of the two appellants. On their arrest samples of their handwriting were collected and upon that evidence the two were convicted.

I have looked at the grounds set out in the petitions of appeal and the submissions of learned counsel on record. There is not a single person from the Kenya Roads Board who has been charged jointly with the two appellants. I say so deliberately because, the genesis of these charges can only be from the offices of the said Kenya Roads Board. That observation notwithstanding, there is evidence that the Kenya Roads Board did not finance any project under the Meru South County Council and therefore whatever transpired could not have been attributed to the said board. The strongest evidence against the two appellants and in particular the 1st appellant Samule Kariuki Njoroge is the evidence of the document examiner P.W. 9 Mr. Kenga.

That evidence is an opinion which is not necessarily binding on the court, and so may need corroboration from other independent evidence. There is evidence that the defence called another document examiner to disapprove the evidence of that expert witness. This was D.W. 2 Mr. Papa. There is also no evidence that was called in respect of the signatures that appeared on the said cheque. For count 1 and 3 to be proved, the prosecution was bound to adduce evidence connecting the two jointly, that is to say establish a common intention in making a false document without authority. I have looked at the submission by the learned counsel for the respondent, that is, the prosecution. With profound respect, the observation that the 2nd appellant was performing his duties as someone accountable to the 1st appellant casts some doubts as to whether or not there was any common intention.

In respect of the 2nd count the prosecution was bound to prove that the 2nd appellant knew the cheque was a false document. Additionally, the account in which the cheque was deposited did not belong to either of the two appellants. Assuming however that the account belonged to the Meru South County Council, and assuming that the two appellants succeeded in withdrawing the said sum of money, proof was required that they were to derive direct and personal benefit from the funds so withdrawn. There is a line that connects all the three counts set out herein above. I say so because the charges are related and one offence would necessarily lead to the other.

There are too many loose ends in this case. How did the other appellants know about this cheque whose source was the Kenya Roads Board? Where is the person to provide the link between the appellants and the Kenya Roads Board additionally there is the issue of the signatures. There was no evidence as rightly observed by the learned counsel for the Republic to show that the signatures were forged and who forged them. Even if we were to believe the evidence of the document examiner, it is only confined to the writing on the cheque and not the signature. Lastly but not least there must have been someone in the Kenya Roads Board who may have informed the appellants, if at all, of the accounts of the Roads boards. That evidence is lacking.

After evaluating all this evidence, I am of the view that the prosecution did not prove the charges against the two appellants beyond reasonable doubts and the convictions were therefore unsafe. Accordingly, these appeals are hereby allowed, conviction quashed and sentences set aside. If the fines were paid, the money should be refunded to the appellants forthwith.

Orders accordingly.

Dated, signed and delivered at Nairobi this 31st day of July, 2011.

A. MBOGHOLI MSAGHA
JUDGE